

1 JUDGE ROBERT S. LASNIK  
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67 UNITED STATES DISTRICT COURT  
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WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, ) NO. CR12-00001RSL  
 Plaintiff, )  
 v. ) DEFENDANT'S RESPONSE TO  
 ) GOVERNMENT'S ADDITIONAL  
 ) BRIEFING  
 TIMOTHY DORAN, )  
 Defendant. )  
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**I. The Government Misreads *United States v. Allen*.**

The government's sole argument is that the "relatedness principle" has no import here because that principle only applies to a Guidelines rather than a reasonableness analysis. Specifically, the government argues that "[a]lthough the *Allen* court ultimately reversed Allen's 360-month sentence on the ground that the sentence was unreasonably high, the important point for purposes of Doran's case is that the court did not incorporate the relatedness principle into the portion of its opinion addressing reasonableness." Govt's Memorandum at 6. In other words, the government contends that even though the *Allen* court reversed the sentence as substantively unreasonable, the court's lengthy discussion of the relatedness principle was confined to its Guidelines analysis despite the fact that in *Allen*, as here, there was no dispute that the unrelated conduct did not impact the Guidelines calculation. *See United States v. Allen*, 488 F.3d 1244, 1252 (10th Cir. 2007) ("the district court correctly calculated an

1 advisory sentencing range of 120-135 months in prison"); *see also* Govt's.  
 2 Memorandum at 5 ("the *Allen* court found that the district court had complied with the  
 3 relatedness principle in determining Allen's offense level").

4 The government's reading of *Allen* – that the 10th Circuit "did not incorporate  
 5 the relatedness principle into the portion of its opinion addressing reasonableness" –  
 6 renders the court's opinion nonsensical. Again, as here, there was no dispute in *Allen*  
 7 that the Guidelines calculation was correct. Rather, the critical issue as framed by the  
 8 10th Circuit was whether it was reasonable for the district court to effectively sentence  
 9 Mr. Allen as if he had committed an entirely different crime:

10 The question presented is whether it was reasonable for the district court  
 11 effectively to sentence Mr. Allen as if he had been tried and convicted of  
 12 attempted criminal sexual abuse or solicitation of murder, when his crime  
 13 of conviction was sale of methamphetamine.

14 *Allen*, 488 F.3d at 1253.

15 While the *Allen* court recognized that "after *Booker*, sentencing courts have  
 16 some latitude to consider evidence and conduct beyond what would have been  
 17 permissible under §§ 1B1.3, 4A1.3, and 5K2.0 in the course of determining whether the  
 18 defendant's criminal history adequately reflects his dangerousness to the community[.]"  
 19 it found that "the district court essentially abandoned consideration of the advisory  
 20 guidelines range and substituted a calculation based explicitly on unrelated conduct  
 21 with which Mr. Allen had not been charged or convicted." *Id.* at 1259. And the court  
 22 made clear that by doing so, the district court "strayed from the path of  
 23 reasonableness." The court explained:

24 Even if it is reasonable to conclude that a defendant who committed  
 25 uncharged crimes or who presents a serious risk of committing future  
 26 crimes deserves greater punishment than a similarly-situated defendant  
 27 who committed no such other crimes and presents no such risk, it is quite  
 28 another thing to conclude that the proper measure of that increase is the  
 29 sentence that would be imposed had the defendant actually been  
 30 convicted of those uncharged, unrelated crimes.

1 *Allen*, 488 F.3d at 1259. The court further opined in its reasonableness discussion that  
 2 while the district court may have based Mr. Allen's sentence on the prospect of his  
 3 future dangerousness rather than on evidence that he actually committed the unrelated  
 4 crimes, that this approach "violates the Constitution's basic guarantee that a defendant  
 5 shall not be punished for 'Crimes' unless tried before and convicted by an impartial  
 6 jury." *Id.* at 1260. Ultimately, the court held that "whatever latitude a sentencing court  
 7 may have to adjust a defendant's sentence in an exercise of *Booker* discretion, it may  
 8 not discard the advisory Guideline range and impose sentence, instead, on the basis of  
 9 evidence of the defendant's uncharged, unrelated misconduct, whether actually  
 10 committed or contemplated for the future." *Id.* at 1262.

11 In sum, contrary to the government's assertions, the *Allen* court did not reverse  
 12 Mr. Allen's sentence based on a generalized unreasonableness analysis but specifically  
 13 found the sentence unreasonable because the district court based its sentence on "an  
 14 entirely different, and far more serious, crime." *Id.* at 1260. In direct contradiction of  
 15 *Allen*, the government urges this Court to "discard the advisory Guideline range and  
 16 impose sentence, instead, on the basis of evidence of the defendant's uncharged,  
 17 unrelated misconduct, whether actually committed or contemplated for the future." *Id.*  
 18 at 1262. As in *Allen*, such a sentence would be constitutionally and substantively  
 19 invalid. The relatedness principle is applicable to the present sentencing. *See United*  
 20 *States v. Pinson*, 542 F.3d 822 (10th Cir. 2008) (quoting *Allen*, 488 F.3d at 1260)  
 21 (distinguishing *Allen*, finding that "[m]uch of the conduct on which the district court  
 22 based its variance was not unrelated to the conduct of defendant's conviction" and thus  
 23 "Mr. Pinson was not sentenced as if he had committed a totally different and 'far more  
 24 serious, crime[.]'"); *cf.*, *United States v. Tucker*, 473 F.3d 556 (4th Cir. 2007) (quoting  
 25 *United States v. Booker*, 543 U.S. 220, 246 (2005)) (vacating upward variance, noting  
 26 that Supreme Court had previously stressed the importance of maintaining "a strong

1 connection between the sentence imposed and the offender's real conduct—a  
 2 connection important to the increased uniformity of sentencing that Congress intended  
 3 its Guidelines system to achieve.””).

4 As noted in Mr. Doran's previous briefing, the relatedness principle is not  
 5 contrary to precedent from the Ninth Circuit. In *United States v. Fitch*, 659 F.3d 788  
 6 (9<sup>th</sup> Cir. 2011), the Court upheld a lengthy sentence in a fraud case based upon a finding  
 7 at sentencing that the defendant committed a homicide that was “a means to commit his  
 8 crimes” for which he was convicted. *See id.* at 795, 797. In this case, the government  
 9 makes no factual argument that the alleged homicide is somehow related to Mr.  
 10 Doran's offense of conviction, Failure to Register as a Sex Offender. Indeed, by  
 11 focusing only on the *Allen* case, the government implicitly acknowledges that the  
 12 alleged homicide in Vietnam is completely unrelated to Mr. Doran's failure to register  
 13 as a sex offender.

14 DATED this 28th day of July, 2014.

15  
 16 Respectfully submitted,

17 s/ *Dennis Carroll*  
 18 Dennis Carroll, WSBA No. 24410  
 19 s/ *Vicki Lai*  
 20 Vicki Lai, WSBA No. 23935  
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 Office of the Federal Public Defender

## CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of filing to all parties registered with the CM/ECF system.

s/ *Charlotte Ponikvar*  
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DEFENDANT'S RESPONSE TO  
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BRIEFING - 5  
(*Timothy Doran, CR12-00001RSL*)